Mid-American Gunite, Inc. *and* Local No. 142, International Brotherhood of Teamsters.[1] Case 13–CA–42309

September 30, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the first amended complaint. Upon a charge filed by the Union on December 21, 2004, the General Counsel issued the first amended complaint on March 7, 2005, against Mid-American Gunite, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On May 2, 2005, the General Counsel filed with the Board a Motion for Default Judgment. On May 3, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a timely response.[2] The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the first amended complaint affirmatively stated that unless an answer was filed within 14 days of service, all the allegations in the first amended complaint would be considered admitted. Further, the undisputed allegations in the Motion for Default Judgment disclose that the Region, by letter dated April 19, 2005, notified the Respondent that unless an answer was received by April 25, 2005, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Michigan corporation with an office and place of business in Griffith, Indiana, has been engaged in the construction business.

During the calendar year proceeding issuance of the first amended complaint, the Respondent, in conducting its operations described above, provided goods and services valued in excess of $50,000 directly to points located outside the State of Indiana.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Local No. 142, International Brotherhood of Teamsters (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals, listed opposite the appropriate titles, have been supervisors and agents of the Respondent within the meaning of Section 2(11) and 2(13) of the Act:

Gerald K. Emerson	Vice President
Frank Kuderik	Vice President

The employees of the Respondent, as described in article 1, sections 3—4 and article 11, section 5 of the local agreement between the Union and the Industrial Contractors Association, Inc., of which the Respondent is a member, effective from August 4, 2003 to May 31, 2006, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

At all material times, the Union has been the designated exclusive bargaining representative of the unit and has been recognized as such by the Respondent. This recognition is embodied in successive collective-bargaining agreements, the most recent of which are the National Maintenance Agreement (with the International Brotherhood of Teamsters) and the Local agreement be-

[1] We have amended the caption to reflect the disaffiliation of Local No. 142, International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] Responses to the Notice to Show Cause were due by May 17, 2005. The only purported response was a facsimile received by the Executive Secretary's Office on May 20, 2005, requesting an extension of time on the ground that the Respondent's counsel was not served with the Motion for Default Judgment. By letter of May 23, the Executive Secretary's Office denied the requested extension, stating that, based on signed return post office receipts and U.S. Postal Service on-line tracking confirmations, it appears that both the Respondent and its counsel were properly served with the Motion for Default Judgment, as well as all other operative documents. The General Counsel's affidavit of service and the signed return post office receipts constitute sufficient prima facie proof that the Respondent and its counsel were served with the Motion for Default Judgment. The Respondent's bare denial fails to rebut the prima facie proof or to create an issue of fact warranting a hearing. See Sec. 102.113 of the Board's Rules and Regulations (specifying that charges, complaints, and other "process and papers by the Agency" may be served by certified mail and that a return post office receipt shall be proof of service by this method).

tween the Union and the Industrial Contractors Association, Inc., which are effective from August 4, 2003 to May 31, 2006.[3]

At all material times, based on Section 9(a) of the Act, the Union has been, and continues to be, the exclusive bargaining representative of the unit named above for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

On about December 1, 2004, the Union, by letter, requested that the Respondent furnish the Union with the following information:

> (i) The number of days along with the dates and hours worked by Mike Robinson from the beginning to the end of his job.
>
> (ii) Number of hours and days and dates worked by the two non-[union] members that drove semis on the jobsite.

The information requested by the Union, as described above, is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.

Since December 20, 2004 and continuing, the Respondent has failed and refused to furnish the Union with the information requested by it.

CONCLUSION OF LAW

By failing and refusing to furnish the Union with the information it requested by letter on about December 1, 2004, the Respondent has failed and refused to bargain collectively and in good faith with the exclusive collective-bargaining representative of its unit employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

Citing, inter alia, his personal positions in *TNT Logistics North America, Inc*., 344 NLRB No. 61 fn. 3 (2005), and *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1228-1230 (2003), our dissenting colleague would deny the General Counsel's Motion for Default Judgment. In his view, a violation of Section 8(a)(5) has not been established because it is not apparent from the complaint allegations how the requested information is relevant to the Union's performance of its duties as the employees' bargaining representative. We disagree.

As in *TNT Logistics*, supra, 344 NLRB No. 61 fn. 3, and *Artesia Ready Mix Concrete*, supra, 339 NLRB at 1225–1227, the central fact in this case is that the Respondent has failed to file a timely answer to the first amended complaint and has thereby effectively admitted all the complaint allegations. Thus, the Respondent has admitted that all the requested information is "necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative" of the unit employees. The Respondent's admission of the relevance of the requested information is sufficient to support an unfair labor practice finding. See, e.g., *TNT Logistics*, supra; *Artesia Ready Mix Concrete*, supra. Consequently, it is appropriate to grant the Motion for Default Judgment based on the Respondent's failure to answer the first amended complaint.[4]

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (5) by failing and refusing to furnish the Union with information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees, we shall order the Respondent to furnish the Union with the information it requested by letter on about December 1, 2004.

ORDER

The National Labor Relations Board orders that the Respondent, Mid-American Gunite, Inc., Griffith, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish Local No. 142, International Brotherhood of Teamsters with information that is necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit referred to in article 1, sections 3—4 and article 11, section 5 of the local agreement between the Union and the

[3] Although the first amended complaint alleges that the Respondent is a member of the Industrial Contractors Association, Inc., there is no contention that the Respondent has delegated to the association the authority to bargain on its behalf. There is also no contention that the Respondent's unit employees have at any time been part of a multiemployer bargaining unit. Accordingly, absent any indication of the requisite consent for multiemployer bargaining, we shall assume that the unit is a single employer unit. We also note that the remedy herein (supply information) does not depend on whether the unit is single employer or multiemployer.

[4] In granting the motion, Chairman Battista notes that the underlying charge, attached to the General Counsel's motion, identifies the grievant as a member of the Union and thus presumably in the bargaining unit. In addition, notwithstanding a Notice to Show Cause, the Respondent never responded at all, much less responded with a contention that the grievant was a nonunit employee. Both the motion and the notice are part of the formal pleadings in the case.

Industrial Contractors Association, Inc., effective from August 4, 2003 to May 31, 2006.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the information it requested on about December 1, 2004.

(b) Within 14 days after service by the Region, post at its facility in Griffith, Indiana, copies of the attached notice marked "Appendix".[5] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 20, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

Contrary to my colleagues, I find entry of a default judgment is inappropriate in this case because the allegations of the complaint, taken as true, fail to establish a violation of the Act.

An employer is required to provide a union with information necessary and relevant to the union's performance of its duties as the exclusive collective-bargaining representative. Failure to provide such information when requested is a violation of Section 8(a)(5). Now, then, while information relating to unit matters is presumptively relevant, information pertaining to nonunit matters is not. In the latter situation, the relevance of the information must be demonstrated by the union before the employer's disclosure obligation is triggered. In this case, the complaint failed to allege facts sufficient to establish the relevance of the requested information.

The complaint alleges that the Respondent refused to furnish the Union with information on the number of days, along with the dates and hours, worked by Mike Robinson from the beginning to the end of his job; and the number of hours and days and dates worked "by the two non[union] members that drove semis on the job site." The complaint on its face does not allege that Mike Robinson is a unit employee. If Robinson is a nonunit employee, the complaint does not allege that the relevance of the requested information was demonstrated by the Union. Similarly, it is not apparent from the allegations of the complaint how the requested information about the "two non[union] members" is necessary and relevant.

"A default judgment is unassailable on the merits, only so far as it is supported by well pleaded allegations assumed to be true." *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975), citing *Thomson v. Wooster*, 114 U.S. 104 (1885). Since the allegations of this complaint are not well pleaded–they fail to adequately allege a violation of the Act–I would deny the General Counsel's motion. See generally for a fuller explication of my position on this issue, *TNT Logistics North America, Inc.*, 344 NLRB No. 61 fn. 3 (2005) and *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1228–1230 (2003) and the cases cited therein.

In response, my colleagues in the majority rely on summary language in the complaint that the requested information was "necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative . . . ." They then conclude that by not answering the complaint, the Respondent has admitted the information's relevance. Such a finding, however, is not supported by the complaint allegations.[1] The

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] As the General Counsel's complaint, not the underlying charge filed by a party, is the operative document in a Board proceeding, the complaint must allege all of the facts necessary for a finding of a violation. See *Freeman Decorating Co.*, 335 NLRB 103, 105 (2001) ("When a Board complaint issues, the question is only the truth of its

complaint in this case does not allege that the requested information involved unit employees. Thus, the information requested may have been non-unit information, in which case the complaint should have alleged that the relevance of such information was *demonstrated* by the Union to the Respondent. Because the complaint does not allege either that the information involved unit employees or that the information's relevance was demonstrated to the Respondent, the complaint is not well pleaded. Consequently, as mentioned, consistent with the Supreme Court's decision in *Thomson v. Wooster*, supra, the complaint is insufficient to support entry of a default judgment.[2]

Dated, Washington, D.C. September 30, 2005

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

accusations. The charge does not even serve the purpose of a pleading." quoting *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17 (1943)).

[2] The standard set by the Supreme Court in *Thomson v. Wooster*, supra, has been left unaltered by the Court and it has been consistently followed by the Circuit Courts. See cases cited in *Artesia Ready Mix Concrete*, supra (Member Schaumber, dissenting). The Supreme Court established this well-pleaded complaint standard as a minimum standard in lieu of the English chancery procedure of granting a default judgment only after an ex parte examination of the case.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to furnish Local No. 142, International Brotherhood of Teamsters with information necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit referred to in article 1, sections 3—4 and article 11, section 5 of the local agreement between the Union and the Industrial Contractors Association, Inc., effective from August 4, 2003 to May 31, 2006.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the information it requested by letter on about December 1, 2004.

MID-AMERICAN GUNITE, INC.